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APPEAL FROM THE CIRCUIT COURT OF

ST. LOUIS COUNTY, MISSOURI, DIVISION 10

THE HONORABLE KENNETH M. ROMINES, JUDGE

APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Circuit Court of St. Louis County, in a civil action for breach of contract in which Plaintiff/Respondent Economy Forms Corporation sought to recover damages from Defendant/Appellant J.S. Alberici Construction Co., Inc. The Circuit Court entered summary judgment in favor of Respondent for $412,198.88 plus costs on February 10, 2000.

The Missouri Court of Appeals, Eastern District, entered its decision and opinion reversing the judgment of the Circuit Court, and denied the applications of Respondent for rehearing and transfer. On March 20, 2001, this Court ordered the case transferred. Jurisdiction of the appeal is now vested in this Court pursuant to the provisions of Article V, Section 10 of the Constitution of Missouri (1945), as amended, and Supreme Court Rule 83.04.

STATEMENT OF FACTS

The following undisputed facts were placed before the Trial Court in the parties' cross-motions for summary judgment, and are reflected in the record on appeal:

Appellant J.S. Alberici Construction Co., Inc. ("Alberici") is a Missouri corporation engaged in business as a construction contractor (Legal File, Volume 1, page 17, hereinafter cited in the form "LF v.1 p.17"). In 1989, Alberici was performing a project for renovation of the Mart Building in the City of St. Louis (id.). Joseph F. Krispin, an Alberici Vice President, was the Project Manager in charge of the Mart Building project (LF v.1 p.22).

Respondent Economy Forms Corporation ("EFCO") is an Iowa corporation engaged in business in Des Moines, Iowa as a manufacturer and lessor of concrete forms for use in construction work (LF v.1 p.17). EFCO's forms are made of steel, in modular sections that can be shipped to a jobsite and bolted together for use (LF v.1 p.22). After the concrete is poured, the forms can be disassembled and shipped back to EFCO for reuse (LF v.1 pp.22-23). A construction contractor who leases EFCO's forms pays a rental charge to EFCO for the time the forms are on the job (LF v.1 p.23).

In 1989, Mr. Krispin placed an order with EFCO to lease forms needed to pour several large concrete columns at the Mart Building project (id,). EFCO was the only source known to Krispin for forms of this size (id.). EFCO required Alberici to sign a printed form contract prepared by EFCO, entitled "Economy Forms Corporation Lease Agreement" (hereinafter referred to as the "Lease Agreement") (LF v.1 p.17). The rental agreed to be paid by Alberici for EFCO's forms was $37.41 per day, and the total rental actually incurred by Alberici for these forms was approximately $3,300 (LF v.1 p.24).

A copy of EFCO's Lease Agreement signed by Alberici is in evidence (LF v.1 pp. 25-26), and is attached in the Appendix to this brief (App. pp.A1-A2). The Lease Agreement is a single sheet of paper, printed on both sides (LF v.1 p.23). The front side includes blanks that are filled in to fit the particular rental transaction, such as the renter's name and address, a description of the forms to be rented, the rental rate, and the signatures of the parties (App. p.A1). The reverse side of EFCO's Lease Agreement consists entirely of additional printed terms written by EFCO, all of which appear under the prominent heading "**WARRANTY TERMS AND CONDITIONS**" placed at the top of the page (LF v.1 p.17; App. p.A2).

Mr. Krispin looked at the front side of EFCO's Lease Agreement to verify that the blanks were correctly filled in by EFCO (LF v.1 p.18). Because of the heading **"WARRANTY TERMS AND CONDITIONS**" at the top of the back side of the form, Krispin concluded that the printed terms on the back had to do with product warranties offered by EFCO concerning the quality and condition of its concrete forms (LF v.1

p.23). Krispin did not read the printed terms on the back side because he did not consider EFCO's product warranties to be very important for his purposes (id.).

Paragraph 14 of the Lease Agreement is one of the printed paragraphs inserted by EFCO on the back of the lease form under the heading of "**WARRANTY TERMS AND CONDITIONS**." It was not the subject of any negotiation between EFCO and Alberici (id.). EFCO has admitted that Paragraph 14 is printed in small type, is surrounded by unrelated terms, and is not highlighted in larger or contrasting type or color and is otherwise not set apart from the other terms of the lease (LF v.1 p.18). Paragraph 14 reads as follows:

> "**14. LIABILITY.** Lessee shall be entirely responsible for and shall pay and exonerate Lessor from liability for damages arising from injury to any persons or property as the result of the use or possession of the Leased Equipment by Lessee, its agents, employees, sub-contractors or any others after its delivery by Lessor and until its return to Lessor's possession. Lessee shall also indemnify, defend and save harmless the Lessor from any such claims, founded or unfounded, and whether based upon alleged negligence or otherwise." (App. p.A2.)

On December 27, 1989, an Alberici employee, Christopher Stawizynski, fell and was injured while disassembling EFCO's concrete forms at the Mart Building project (LF v.1 p.19). Mr. Stawizynski received workers' compensation benefits from Alberici for his injuries (id.).

In 1994, Stawizynski brought a negligence and products liability suit (hereinafter referred to as the "Stawizynski suit") against EFCO and five other defendants, seeking damages for the same injuries (LF v.1 p.19). A copy of Stawizynski's petition is in evidence (LF v.1 p.66). By letter dated November 27, 1995, EFCO's attorneys requested Alberici to defend and indemnify EFCO against the Stawizynski suit (LF v.1 p.112). On December 7, 1995, Alberici's insurors acknowledged receipt of the request, and on January 6, 1996, through its insurors, Alberici rejected EFCO's request for defense and indemnity against Stawizynski's claims on the ground that Paragraph 14 of the Lease Agreement makes no mention of any undertaking by Alberici to defend and indemnify EFCO against EFCO's own fault or negligence (LF v.1 pp.47-48).

Stawizynski's claims against EFCO were unsuccessful. In July, 1998, a final judgment was entered in favor of EFCO in the Stawizynski suit (LF v.1 p.48).

EFCO commenced this action in February, 1999 (LF v.1 p.58). On November 9, 1999, EFCO filed its First Amended Petition herein (LF v.1 p.6). By its First Amended Petition, EFCO seeks to recover the fees and expenses paid by EFCO to defend the Stawizynski suit as damages for Alberici's alleged breach of the indemnity clause in Paragraph 14 of the Lease Agreement (LF v.1 p.8). In its Answer to the First Amended Petition, Alberici denied that the Lease Agreement created a contractual obligation to defend EFCO in the Stawizynski suit (LF v.1 p.12).

After the case was at issue, Alberici filed a Motion for Summary Judgment on November 18, 1999 (LF v.1 p.16). EFCO's response to Alberici's Motion did not deny any of the factual statements set forth in Alberici's Motion (LF v.1 pp. 121-137). EFCO

filed a cross-Motion for Summary Judgment on November 22, 1999 (LF v.1 p.45). Both parties agreed in their cross-motions that there are no genuine issues of material fact in dispute as to liability. As to liability, both motions turned on the issue whether Paragraph 14 of the Lease Agreement imposed on Alberici a contractual duty to defend EFCO in the Stawizynski suit.

The cross-motions were argued before the Trial Court and submitted on January 11, 2000, and on February 10, 2000, the Trial Court entered its "Judgment and Order" granting summary judgment in favor of EFCO and against Alberici for damages totalling $412,198.88 (LF v.3 pp. 54-59). The Trial Court cited no legal authority in its Judgment and Order (id.).

Following timely notice of appeal and presentation of briefs and oral argument before the Court of Appeals for the Eastern District, the Court of Appeals issued its decision and opinion on November 28, 2000, reversing and remanding the decision below.

POINTS RELIED ON

I.

The Trial Court erred in granting summary judgment to Plaintiff EFCO, because the Trial Court misapplied the law to the facts in construing Paragraph 14 of the Lease Agreement to require Alberici to indemnify EFCO against the Stawizynski suit, in that the Stawizynski suit was based solely on the negligence and fault of EFCO; under Missouri law even a broad indemnity agreement does not create a duty to indemnify against the indemnitee's own

fault or negligence unless the indemnity agreement states clearly and unequivocally that the indemnitee's own fault or negligence is included; and the Lease Agreement did not clearly and unequivocally state that Alberici agreed to indemnify EFCO against EFCO's own fault or negligence.

Missouri District Tel. Co. v. Southwestern Bell Tel. Co. (Mo. banc 1935) 93 S.W.2d 19

Kansas City Power & Light Co. v. Federal Construction Corp. (Mo. 1961) 351 S.W.2d 741

Pilla v. Tom-Boy, Inc. (Mo.App.E.D. 1988) 756 S.W.2d 638

Parks v. Union Carbide Corp. (Mo banc 1980) 602 S.W.2d 188, 190

II.

The Trial Court erred in granting summary judgment to Plaintiff EFCO, because the Trial Court misapplied the law to the facts in construing Paragraph 14 of the Lease Agreement to require Alberici to indemnify EFCO against the Stawizynski suit, in that the Stawizynski suit was based solely on the negligence and fault of EFCO; under Missouri law an agreement to indemnify against the indemnitee's own fault or negligence must be set forth conspicuously; and the indemnity provisions of the Lease Agreement were not conspicuous.

Burcham v. Procter & Gamble Manufacturing Co. (E.D.Mo. 1993) 812 F.Supp. 947 (Missouri law)

United States v. Conservation Chemical Co. (W.D.Mo. 1986) 653 F.Supp. 152 (Missouri law)

Dresser Industries, Inc. v. Page Petroleum, Inc. (Tex. 1993) 853 S.W.2d 505

Sale v. Slitz (Mo.App.S.D. 1999) 998 S.W.2d 159

Section 400.1-201(10), RSMo.

Section 400.2A-102, RSMo.

Section 400.2A-214, RSMo.

III.

The Trial Court erred in granting summary judgment to Plaintiff EFCO, because the Trial Court misapplied the law to the facts in construing Paragraph 14 of the Lease Agreement to require Alberici to indemnify EFCO against the Stawizynski suit, in that the Stawizynski suit sought recovery for work-related injury to Alberici's employee; the Missouri Workers' Compensation Law provides immunity to Alberici against liability to "any person" for injury to its employee; and the Lease Agreement was insufficient to overcome Alberici's statutory immunity under the Missouri Workers' Compensation Law.

Parks v. Union Carbide Corp. (Mo banc 1980) 602 S.W.2d 188, 190

Bonenberger v. Associated Dry Goods Co. (Mo.App.E.D. 1987) 738 S.W.2d 598

Martin v. Fulton Iron Works Co. (Mo.App.E.D. 1982) 640 S.W.2d 491

Linsin v. Citizens Electric Co. (Mo.App.E.D. 1981) 622 S.W.2d 277

Section 287.120, RSMo.

IV.

The Trial Court erred in granting summary judgment to Plaintiff EFCO, because the Trial Court misapplied the law to the facts in construing Paragraph 14 of the Lease Agreement to require Alberici to indemnify EFCO against the Stawizynski suit, in that under Missouri law EFCO, as a manufacturer, had the duty to indemnify Alberici against products liability for EFCO's products; and the Lease Agreement was insufficient to overcome the obligation imposed on EFCO by law.

Palmer v. Hobart Corp. (Mo.App.E.D. 1993) 849 S.W.2d 135

Restatement, Second, Contracts, Section 195, Comment c

ARGUMENT

The parties agreed below, and the record reflects, that there is no disputed issue of fact as to liability. It was therefore appropriate that the case be decided on the parties' cross-motions for Summary Judgment.

The Trial Court's error consisted in misapplying the law to the facts by construing Paragraph 14 of the Lease Agreement to impose on Alberici the duty to defend EFCO in the Stawizynski suit, and in granting Summary Judgment to EFCO on the strength of this erroneous construction. We demonstrate below that as a matter of law, under principles firmly settled in decisions of this Court and the Courts of Appeals, Paragraph 14 of the Lease Agreement cannot be construed to require Alberici to indemnify EFCO against Stawizynski's claims, and therefore did not require Alberici to

defend EFCO in the Stawizynski suit. Summary Judgment should therefore have been entered for Alberici, not EFCO.

In compliance with Supreme Court Rule 84.04(e), and in an effort to assist this Court's understanding of the issues, we first deal with two preliminary matters, both of which pertain to all of Appellant's claims of error below:

Standard of Review

On appeal from summary judgment, the appellate court views the record in the light most favorable to the party against whom judgment was entered (ITT Commercial Finance. Corp. v. Mid-America Marine Supply Corp. (Mo. banc 1993) 854 S.W.2d 371). Appellate review of a grant of summary judgment is essentially de novo (id.). Whether or not summary judgment was proper is purely a question of law, in which the criteria applied on appeal are no different from those which the trial court should apply. Accordingly, upon appellate review, no presumption or deference is accorded to the trial court's order (id. Accord: Combined Communications Corp. v. City of Bridgeton (Mo.App.E.D. 1996) 939 S.W.2d 460).

The Duty to Defend

Depends Upon a Duty to Idemnify

EFCO's claim, in a nutshell, is that Paragraph 14 of the Lease Agreement imposed on Alberici a contractual duty to defend EFCO against the Stawizynski suit.

Most of the body of law concerning a "duty to defend" arises in the context of an insurance company's duty, under a policy of liability insurance, to defend the insured against a third-party suit. If the claim against the insured is covered by the

policy, the insuror must provide the defense, even if the claim ultimately fails and there is no actual loss to be indemnified. For this reason, it is often said that "an insuror's duty to defend is broader than its duty to indemnify," a maxim repeated by the Trial Court in its Judgment and Order (LF v.3 p.57). An insuror's duty to defend is determined by comparing the language of the policy with the allegations of the petition in the action against the insured (Valentine-Radford, Inc. v. American Motorists Ins. Co. (Mo.App.W.D. 1999) 990 S.W.2d 47). The burden to prove policy coverage is on the insured (id.).

Alberici is not an insurance company, and is not subject to the special obligations and liabilities imposed by the law on insurance companies as a class. However, a proper understanding of the maxim of insurance law referred to above helps to clarify the issues in this case. Although an insuror's duty to defend is broader than its duty to indemnify, the duty to defend is not without limit. Even an insurance company has no duty to defend against a claim for which it has no duty to indemnify in the event of loss, i.e., a claim that is not within the coverage of the insurance contract (McDonough v. Liberty Mutual Ins. Co. (Mo.App.E.D. 1996) 921 S.W.2d 90; S. Spicer Motors v. Federated Mutual Ins. Co. (Mo.App.S.D. 1988) 758 S.W.2d 191). The insuror's duty to defend depends on whether the policy covers the third-party claims alleged in the petition filed against the insured (id.). Thus, a duty to defend does not exist if the insurance contract would not impose on the insuror a duty to indemnify the insured against actual liability for the claims asserted in the third party's petition.

Applying the same principle by analogy here, Alberici had no duty to defend EFCO against the Stawizynski suit if Alberici would not have been required by Paragraph 14 of the Lease Agreement to indemnify EFCO against a judgment in favor of Stawizynski on the claims alleged in his petition. In this sense, the duty to indemnify is determinative of the duty to defend. "Absent a duty to indemnify there is no obligation to pay attorneys' fees" (Fisk Electric Co. v. Constructors & Associates, Inc. (Tex. 1994) 888 S.W.2d 813, 815).

In short, EFCO's claim is for failure to defend; but the key question is whether the Lease Agreement would have required Alberici to indemnify EFCO if EFCO had been found liable to Stawizynski for the claims alleged in Stawizynski's petition. We demonstrate in this Brief that, as a matter of law, for several different reasons, the Lease Agreement did not require Alberici to indemnify EFCO against liability for the claims asserted in Stawizynski's petition, which were based solely on negligence and fault of EFCO. It follows that the Lease Agreement did not impose on Alberici a duty to defend EFCO in the Stawizynski suit.

I.

The Trial Court erred in granting summary judgment to Plaintiff EFCO, because the Trial Court misapplied the law to the facts in construing Paragraph 14 of the Lease Agreement to require Alberici to indemnify EFCO against the Stawizynski suit, in that the Stawizynski suit was based solely on the negligence and fault of EFCO; under Missouri law even a broad indemnity agreement does not create a duty to indem-

nify against the indemnitee's own fault or negligence unless the indemnity agreement states clearly and unequivocally that the indemnitee's own fault or negligence is included; and the Lease Agreement did not clearly and unequivocally state that Alberici agreed to indemnify EFCO against EFCO's own fault or negligence.

A. The claims asserted against EFCO in the Stawizynski suit were based solely on the negligence and fault of EFCO as the designer and manufacturer of the concrete forms from which Stawizynski fell.

The record contains a copy of the petition filed against EFCO in the Stawizynski suit (LF v.1 pp.66-111). Stawizynski's claims asserted against EFCO in the petition were based exclusively on EFCO's negligence and EFCO's liability as the designer and manufacturer of defective products. Stawizynski alleged that EFCO was liable for his injuries caused by these design and manufacturing defects, under theories of negligence and product liability. More particularly, Stawizynski alleged that as a result of EFCO's negligent errors in design and manufacture of its concrete forms, the forms were defective in that they permitted the hook of Stawizynski's safety belt to become disattached, causing him to fall, and that EFCO failed to warn of these defects (LF v.1 pp.99, 102-103). There was no assertion by Stawizynski that any negligence or fault on the part of Alberici contributed to or resulted in EFCO's alleged liability to Stawizynski for his injuries.

The fact that the liability of EFCO asserted in the Stawizynski petition was based exclusively on the alleged negligence and fault of EFCO means that EFCO's claim against Alberici could not succeed unless Paragraph 14 of the Lease Agreement were construed to impose on Alberici the duty to indemnify EFCO against EFCO's own negligence and fault--in effect, the duty to become EFCO's liability insuror.

Plainly, such a drastic result would be contrary to the normal intentions and expectations of the parties in ordinary business transactions, such as the lease transaction here. In such transactions, a firm like Alberici might well expect to be asked to indemnify another party against liability resulting from Alberici's own actions, including its own negligence. But a firm like Alberici would not expect that by signing the manufacturer's printed lease contract in order to lease concrete forms for $3,300 it has become the liability insuror for the manufacturer's negligence and products liability.

B. Under Missouri law, indemnity language that is seemingly broad and general enough to include the indemnitee's negligence will nevertheless not be construed to impose a duty to indemnify against the indemnitee's own fault or negligence unless the contract says so in clear and unequivocal terms.

EFCO's argument is disingenuously simple: It is that the indemnity language in Paragraph 14 of the Lease Agreement covers "any" claims for "injury to any persons or property" during Alberici's use of the leased concrete forms; and that this language is so broad, general and all-encompassing as to include every conceivable claim that might be made against EFCO, including Stawizynski's claims based on EFCO's own negligence

and fault. The Trial Court agreed, holding in its Judgment and Order that the Lease Agreement terms "provide for Alberici to defend EFCO against any and all claims" (LF v.3 p.69). (Emphasis added here and throughout unless otherwise noted.) However, this analysis flies in the face of Missouri's firmly established rule to the contrary. Missouri law, like that of most states, refuses to countenance the use of broad, general indemnity language as a trap for the unwary, to turn ordinary business contracts into insurance policies.

This Court has repeatedly held that, as a matter of law, "mere general, broad and seemingly all-inclusive language in the indemnifying agreement is not sufficient to impose liability for the indemnitee's own negligence" (Kansas City Power & Light Co. v. Federal Construction Corp. (Mo. 1961) 351 S.W.2d 741, 745). Unless there is additional language specifically mentioning, in so many words, that the indemnity extends to injury caused by the indemnitee's negligence or fault, "broad and general terms will not be construed to indemnify [the indemnitee] for its own acts of negligence" Parks v. Union Carbide Corp. (Mo banc 1980) 602 S.W.2d 188, 190).

These principles are referred to in this Brief as the **"clear and unequivocal" requirement**. By definition, the clear and unequivocal requirement cannot be satisfied by broad and general indemnity language such as "any and all claims," since the requirement is imposed by this Court and the Courts of Appeals in precisely those cases where indemnity language is general enough, taken literally, to include negligence or fault of the indemnitee. More is required. The purpose of the clear and unequivocal rule is to require specific, explicit contract language referring unequivocally to the negligence

or fault of the indemnitee (EFCO here) as a prerequisite for altering the normal legal relationships inherent in traditional notions of fault-based justice (see Alack v. Vic Tanny International of Mo., Inc. (Mo banc 1996) 923 S.W.2d 330, 337).

The leading Missouri case imposing the clear and unequivocal requirement is Missouri District Tel. Co. v. Southwestern Bell Tel. Co. (Mo. banc 1935) 93 S.W.2d 19), involving lease language quite similar to that in EFCO's Lease Agreement. The lease provided that the lessee would indemnify the lessor against

> "any and all claims, suits, judgments for damages or injuries arising to persons or property or in any manner by reason of the use" of the leased property (93 S.W.2d at 26).

The Court held that this language did not impose a duty on the lessee to indemnify the lessor against the lessor's negligence. The Court stated that though the lease language is "very broad and indefinite," it "does not say plainly or otherwise that respondent [lessee] shall indemnify the telephone company [lessor] for the consequences of its own wrongs" (93 S.W.2d at 27).

The clear and unequivocal requirement is the settled law of Missouri. It has been uniformly applied by Missouri appellate courts to deny indemnity against wrongful conduct of the indemnitee in at least 18 additional reported cases during the 66 years since the Missouri District Tel. Co. decision:

> Parks v. Union Carbide Corp. (Mo. banc 1980) 602 S.W.2d 188; Kansas City Power & Light Co. v. Federal Construction Corp. (Mo. 1961) 351 S.W.2d 741; New York Cent. R. Co. v. Chicago & E.I.R. Co. (Mo. 1950) 231

S.W.2d 174; K.C. Landsmen, L.L.C. v.Lowe-Guido (Mo.App.W.D. 2001) Case No. WD58147 (slip opinion); Mathis v. Jones Store, Inc. (Mo.App.W.D. 1997) 952 S.W.2d 360; Industrial Risk Insurers v. International Design & Mfg., Inc. (Mo.App.S.D. 1994) 884 S.W.2d 432; Allison v. Barnes Hospital (Mo.App.E.D. 1994) 873 S.W.2d 288; Howe v. Lever Bros. Co. (Mo.App.E.D. 1993) 851 S.W.2d 769; Pilla v. Tom-Boy, Inc. (Mo.App.E.D. 1988) 756 S.W.2d 638; Bonenberger v. Associated Dry Goods Co. (Mo.App.E.D. 1987) 738 S.W.2d 598; Asher v. Broadway-Valentine Center, Inc. (Mo.App.W.D. 1985) 691 S.W.2d 478; Martin v. Fulton Iron Works Co. (Mo.App.E.D. 1982) 640 S.W.2d 491; Linsin v. Citizens Electric Co. (Mo.App.E.D. 1981) 622 S.W.2d 277; Commerce Trust Co. v. Katz Drug Co. (Mo.App. 1977) 552 S.W.2d 323; Southwestern Bell Tel. Co. v. J.A. Tobin Const. Co. (Mo.App. 1976) 536 S.W.2d 881; Midwestern Realty Corp. v. City of Grandview (Mo.App. 1967) 416 S.W.2d 35; Paro v. Pennsylvania Railroad Co. (Mo.App. 1961) 348 S.W.2d 613; Thomas v. Skelly Oil Co. (Mo.App. 1960) 344 S.W.2d 320.

A few additional examples from these cases will further illustrate how Missouri appellate courts have applied the clear and unequivocal requirement to particular contractual indemnity language.

In Kansas City Power & Light, the contract before this Court included the following broad indemnity provisions:

"The Contractor . . . shall indemnify and save harmless the Company . . . from all suits or actions of every nature or description for, or on account of, damage or injuries received or sustained by any party or parties by or from the Contractor, his agents, or servants in the performance of the work.

* * *

The Contractor shall indemnify, defend and save the Company harmless from all loss, cost, expense, damage, judgment or other obligations resulting from or arising out of the acts or omissions of the Contractor

* * *

The Contractor. . . shall hold and save harmless the Company from, any and all actual or alleged damages, injuries, costs, expenses, suits, causes of action or claims, whether relating to persons or property or both, arising out of or as a consequence of the construction . . . ." (351 S.W.2d at 743).

The quoted language (like that in the Missouri District Tel. Co. case) is fully as broad and all-inclusive as that in EFCO's Lease Agreement. However, this Court held that as a matter of law, the contract did not require the "Contractor" to indemnify the "Company" against liability resulting from the Company's own negligence. The Court stated that "a contract of indemnity will not be construed so as to indemnify one against loss or damage resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms." Consequently, "mere general, broad, and seemingly all-inclusive language in the indemnifying agreement is not sufficient to impose liability for the indemnitee's own negligence" (351 S.W.2d at 745).

In Pilla v. Tom-Boy, Inc. (Mo.App.E.D. 1988), the following lease provision was before the Court:

> "Lessee agrees to save the Lessor . . . harmless from any and all damages and damage suits in connection with the liability for any and all injuries or damages suffered by any . . . persons whomsoever, in, about or adjacent to said premises" (756 S.W.2d at 639).

The Court held that the lease language did not clearly and unequivocally express an intention to indemnify the Lessor against the Lessor's own negligence. "Broad, general language of the type here is insufficient" (756 S.W.2d at 641).

By contrast, Missouri Pacific R. Co. v. Rental Storage & Transit Co. (Mo.App. 1975) 524 S.W.2d 898 was a case involving contract language that did satisfy the clear and unequivocal requirement. The contract provided that the shipper should indemnify the Railroad against any and all claims, "notwithstanding any possible negligence (whether sole, concurrent or otherwise) on the part of the [Railroad], its agents or employees" (524 S.W.2d at 903). The difference is obvious. This contract explicitly and specifically stated that negligence of the indemnitee was covered by the indemnity obligation, thereby satisfying the clear and unequivocal requirement.

C. The Lease Agreement in this case does not satisfy Missouri's "clear and unequivocal" rule, and therefore did not require Alberici to indemnify EFCO against EFCO's own fault and negligence asserted in the Stawizynski suit.

The indemnity language in Paragraph 14 of the Lease Agreement is precisely the type of "broad, general and seemingly all-inclusive" language which the clear and unequivocal requirement holds insufficient.

Paragraph 14 refers to claims against Lessor (EFCO) "arising from injury to any persons . . . as the result of the use or possession of the Leased Equipment by Lessee," and states that the Lessee shall indemnify the Lessor against "any such claims." We readily admit that as a matter of semantics, this language could be interpreted in the broadest literal sense to include third-party claims based on EFCO's own negligence and fault, not to mention claims based on EFCO's deliberate and wilful misconduct. However, neither in Paragraph 14 nor anywhere else does EFCO's Lease Agreement make any explicit mention of negligence or fault of EFCO as part of the Lessee's indemnity obligation, as the clear and unequivocal rule would require. In this respect, the language of Paragraph 14 is legally indistinguishable from the corresponding indemnity language found insufficient in Missouri District Tel. Co. ("any and all claims, suits, judgments for damages or injuries arising to persons or property or in any manner by reason of the use" of the leased property (93 S.W.2d at 26)).

The phrase at the end of Paragraph 14, "whether based upon alleged negligence or otherwise," does not satisfy the clear and unequivocal requirement. It simply means, unsurprisingly, that the Lessee's indemnity obligation includes claims against EFCO based on the Lessee's negligence. Alberici has never contended that negligence of Alberici would be excluded from the scope of the indemnity under the Lease Agreement. The issue here is not whether negligence is covered by the indemnity

language, the issue is whose negligence or other wrongful conduct is covered. The clear and unequivocal rule requires that an indemnity contract expressly state, in so many words, that negligence of the indemnitee is included; otherwise, as a matter of law, the contract cannot be construed to indemnify against negligence of the indemnitee.

The Trial Court misapplied the clear and unequivocal rule, in holding that the terms of Paragraph 14 "clearly and unequivocally provide for Alberici to defend EFCO against any and all claims" (LF v.3 p.57). What is required by the rule is not a clear, unequivocal expression of broad, general language like "any and all claims." What is required by the rule, but is utterly lacking in the Lease Agreement, is that the specific intention to indemnify against negligence or fault of the indemnitee be clearly and unequivocally stated.

The language of EFCO's Lease Agreement is broad and general, like that in Missouri District Tel. Co. and its progeny cited above. The Lease Agreement contains no reference to negligence or fault of the indemnitee EFCO, such as was present in the Rental Storage case. EFCO's Lease Agreement does not satisfy the clear and unequivocal requirement, which has been uniformly upheld and applied in Missouri appellate decisions. The Trial Court's decision cannot be reconciled with this established rule of law, and the Trial Court made no effort to do so in its Judgment and Order.

The Court of Appeals, in its opinion, concluded that "the language of the indemnification paragraph fails to clearly and unequivocally require Alberici to indemnify EFCO from its own negligent acts, and therefore the trial court erred in

granting summary judgment for EFCO" (Slip Opn. p.4). We respectfully submit that the Court of Appeals correctly applied the law of Missouri in reaching this conclusion.

II.

The Trial Court erred in granting summary judgment to Plaintiff EFCO, because the Trial Court misapplied the law to the facts in construing Paragraph 14 of the Lease Agreement to require Alberici to indemnify EFCO against the Stawizynski suit, in that the Stawizynski suit was based solely on the negligence and fault of EFCO; under Missouri law an agreement to indemnify against the indemnitee's own fault or negligence must be set forth conspicuously; and the indemnity provisions of the Lease Agreement were not conspicuous.

In order to create an enforceable contractual duty to indemnify against the indemnitee's own negligence or fault, not only must the contract language explicitly say so (the clear and unequivocal rule), but the provision containing the explicit language must be conspicuous in the contract (Burcham v. Procter & Gamble Manufacturing Co. (E.D.Mo. 1993) 812 F.Supp. 947 (Missouri law); United States v. Conservation Chemical Co. (W.D.Mo. 1986) 653 F.Supp. 152 (Missouri law). Accord: Dresser Industries, Inc. v. Page Petroleum, Inc. (Tex. 1993) 853 S.W.2d 505). This principle is referred to hereinafter as the "**conspicuousness requirement**" of indemnity agreements.

In order to be conspicuous, a contract provision must be different, stand out, and thus attract the attention of a reader. The Missouri Uniform Commercial Code,

Section 400.1-201(10), RSMo, provides that "language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color."

The indemnity language relied on by EFCO in Paragraph 14 of the Lease Agreement is not conspicuous under the Code definition. It is an undisputed fact, set forth in Alberici's Motion for Summary Judgment and not denied by EFCO, that Paragraph 14 "is not highlighted in larger or contrasting type or color" (LF v.1 p.18). Paragraph 14 is in the same fine, black print as all of the other boiler plate on the reverse side of the Lease Agreement (App. p.A2).

Cases decided under the law of Missouri, and that of other states that impose the conspicuousness requirement, help to illustrate further what is required to be conspicuous.

In Sale v. Slitz (Mo.App.S.D. 1999), 998 S.W.2d 159, the Court found, because of the location of an exculpatory clause, that the clause was not conspicuous. The clause in that case, like Paragraph 14 of the EFCO Lease Agreement, was one of a number of printed terms located on the reverse side of a contract (998 S.W.2d at 164).

In Burcham, supra, applying Missouri law, the Court held that the indemnity provision was

> "not sufficiently conspicuous to warrant its enforcement. The provision appears in small print on the back of a boiler plate purchase order form supplied to Bazan [the indemnitor] by P&G [the indemnitee]. It is surrounded by unrelated terms and is not highlighted, printed in bold type or otherwise set apart from the other provision in the contract in order that a contractor

such as Bazan would note its inclusion in the contract. 'Where a provision appears on the back of a printed form surrounded by unrelated terms, it is not conspicuous and may not be enforced'" (812 F.Supp. At 948).

Each of the disqualifying features cited in Burcham applies to the indemnity language in Paragraph 14 of EFCO's Lease Agreement. It is on the "back of a boiler plate" form supplied by EFCO. The undisputed facts in the record state that Paragraph 14 is "printed in small type, is surrounded by unrelated terms, and is not highlighted in larger or contrasting type or color and is not otherwise set apart from the other terms of the lease" (LF v.1 p.18). The misleading heading of "**WARRANTY TERMS AND CONDITIONS**" on the reverse side of the Lease Agreement makes it appear that the fine-print terms on the reverse side have to do with EFCO's product warranty, further reducing the likelihood that a rental customer would notice that an indemnity clause appears on that page.

In U.S. Rentals, Inc. v. Mundy Service Corp. (Tex.App. 1995) 901 S.W.2d 789, 792-793, the Court found an indemnity term unenforceable for lack of conspicuousness for reasons squarely applicable to Paragraph 14 of EFCO's Lease Agreement:

> "The indemnity provision was the seventh of fifteen unrelated provisions spanning the back of the rental contract. The headings and text of all fifteen were printed in the same respective sizes and types. Thus, the indemnity provision was no more visible than any other provision on the back of the page. . . . Indemnity provisions set forth among unrelated terms and condi-

tions on the backs of forms, and printed without distinguishing typeface, have generally been held not to be conspicuous."

Similarly, in K&S Oil Well Service, Inc. v. Cabot Corp. (Tex.App. 1973) 491 S.W.2d 793, the Court held an indemnity provision unenforceable because it appeared on the reverse side of a sales order, under a paragraph misleadingly entitled "Warranty," and was surrounded by completely unrelated terms.

It is noteworthy that the EFCO Lease Agreement does contain one conspicuous term. A disclaimer of implied warranties in a lease of personal property is ineffective unless conspicuous (Section 400.2A-214, RSMo). The disclaimer of implied warranties in the EFCO Lease Agreement, at the end of the printed terms on the reverse side, is in capital letters, bold face, as required for conspicuousness by Section 400.1-201(10), RSMo. The marked contrast between this warranty disclaimer, and Paragraph 14 above it, serves to emphasize the failure of the printed form to make the indemnity provisions in Paragraph 14 conspicuous.

In short, Paragraph 14 of the EFCO Lease Agreement suffers from the same defects that prevented indemnity language from being conspicuous, and therefore made it unenforceable, in the cases cited above. Paragraph 14 of the EFCO Lease Agreement also fails to meet the definition of a conspicuous term under the Missouri Uniform Commercial Code, which is applicable to personal property leases (Section 400.2A-102). The Court of Appeals correctly found that "the indemnity paragraph was not conspicuous" (Slip Opn. p.7). Since Paragraph 14 is not conspicuous, it would not support

EFCO's claim for indemnity against EFCO's own negligence even if the language had satisfied the clear and unequivocal requirement.

There is an additional reason, implicit in the clear and unequivocal and conspicuousness requirements, why the construction of the Lease Agreement must be decided against EFCO. The party which prepares a contract has the ability to make a provision clear and unequivocal, conspicuous, or both. In Missouri law, when any doubt exists, a contract will be construed against the party which prepared the contract (Graue v. Missouri Property Ins. Placement Facility (Mo. banc 1993) 847 S.W.2d 779). This canon of construction lies behind the usual rule that insurance policies are construed strictly against the insurance company (id.).

EFCO would turn this canon on its head by claiming to be the "insured" under Paragraph 14 of the Lease Agreement, with Alberici as the "insurance company." But EFCO, not Alberici, prepared the Lease Agreement and buried its indemnity provisions in printed boiler plate on the back (LF v.1 p.23). There was no negotiation of the indemnity language (id.). EFCO required Alberici to sign EFCO's form contract in order to obtain the concrete forms needed by Alberici, for which EFCO was the only known source (id.). Under these circumstances, EFCO's failure, as the drafter of the contract, to satisfy both the clear and unequivocal rule, and the requirement for conspicuousness, requires that Paragraph 14 be construed not to cover indemnity against EFCO's own fault or negligence. It therefore did not require Alberici to defend EFCO in the Stawizynski suit.

III.

The Trial Court erred in granting summary judgment to Plaintiff EFCO, because the Trial Court misapplied the law to the facts in construing Paragraph 14 of the Lease Agreement to require Alberici to indemnify EFCO against the Stawizynski suit, in that the Stawizynski suit sought recovery for work-related injury to Alberici's employee; the Missouri Workers' Compensation Law provides immunity to Alberici against liability to "any person" for injury to its employee; and the Lease Agreement was insufficient to overcome Alberici's statutory immunity under the Missouri Workers' Compensation Law.

The Missouri Workers' Compensation Law contains a well-known trade-off: In return for requiring employers to pay compensation for employee injuries without regard to fault, the law grants employers immunity against any other liability for employee injuries. Section 287.120 of the Workers' Compensation Law provides, in relevant part:

> "Every employer . . shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of his employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person."

Thus, the statute bars a third party from attempting, by any means, to pass back to an employer the third party's tort liability to an employee for a job-related injury.

To do otherwise would force the employer to pay twice for the employee's injury: once through workers' compensation, and again through indemnity to the third party.

As applied to the instant case, the statutory bar of Section 287.120 means that the third party (EFCO) may not enforce indemnity against the employer (Alberici) with respect to claims made against EFCO by Alberici's employee Stawizynski for injuries sustained in the course of employment. Alberici paid for Stawizynski's injury once, through Workers' Compensation benefits (LF v.1 p.19). On its face, the statutory bar of Section 287.120 releases Alberici from any duty to pay again by indemnifying EFCO against Stawizynski's claims and, as pointed out earlier, Alberici could have no duty to defend EFCO if it had no duty to indemnify EFCO.

In McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co., (Mo. 1959) 323 S.W.2d 788, the Court held that Missouri law would permit an employer to waive by contract the employer's immunity under Section 287.120. However, the subsequent decision of this Court in Parks v. Union Carbide Corp. (Mo. banc 1980) 602 S.W.2d 188, and its progeny, have made it clear that the scope of the McDonnell exception is very narrow, and that an employer's contract must be exceptionally definite and explicit before it will be construed to waive the protection afforded by the Workers' Compensation Law.

As a result, when an employee asserts that a third party is liable for injury to the employee resulting from the third party's negligence or fault -- precisely the claim made by Stawizynski against EFCO -- Missouri courts have consistently refused to permit the third party to use a contractual indemnity provision to shift the asserted

liability back to the employer, if the contract language does not expressly and specifically provide that the employer has agreed to indemnify the third party against the third party's own negligence or fault (Parks v. Union Carbide Corp., supra; Missouri Pacific R. Co. v. General Mills, Inc. (Mo.App.W.D. 1987) 743 S.W.2d 433; Bonenberger v. Associated Dry Goods Co. (Mo.App.E.D. 1987) 738 S.W.2d 598; Martin v. Fulton Iron Works Co. (Mo.App.E.D. 1982) 640 S.W.2d 491; Linsin v. Citizens Electric Co. (Mo.App.E.D. 1981) 622 S.W.2d 277).

In Parks, an employee of Chemline Corp. was performing work on the premises of Union Carbide. The employee was injured by caustic chemicals erupting from Union Carbide's tanks, and the employee sued Union Carbide for negligence. Union Carbide sought indemnity from the employer Chemline, relying on Chemline's contractual undertakings to warn its employees of the hazards in the work and to assume responsibility for the results.

This Court held that neither Chemline's agreement to warn its employees, nor its agreement to assume responsibility for results, were sufficient to create a duty in Chemline to indemnify Carbide because the contract "does not mention personal injuries caused by Carbide's own negligence, and such broad and general terms will not be construed to indemnify Carbide for its own acts of negligence" (602 S.W.2d at 190). By the same token, the Lease Agreement in this suit does not mention personal injuries caused by EFCO's own negligence, and therefore may not be construed to indemnify EFCO for its own acts of negligence.

In Martin v. Fulton Iron Works Co., supra, the Court observed that

"Parks narrows McDonnell by requiring an express promise . . . to indemnify liabilities due to the indemnitee's own negligence. Aside from such an express agreement, an employer is not liable to the non-employer defendant for any sums that the latter might be responsible for in tort to the injured plaintiff-employee" (640 S.W.2d at 496).

Similarly, in Linsin v. Citizens Electric Co., supra the Court held that after Parks, to come within the exception to the employer's statutory immunity,

"there must be an express promise to indemnify. Such an agreement must contain in clear and unequivocal terms 'an intention to indemnify liabilities due to indemnitee's own negligence'" (622 S.W.2d at 281).

The decisions have applied this strict requirement in cases like the one at bar, where the general indemnity language was seemingly all-inclusive. Bonenberger v. Associated Dry Goods Co., supra, is quite similar to the instant case. Associated leased its premises to Bonenberger's employer. Bonenberger was injured on the job, and sued the lessor, Associated, for its negligence. Associated brought a third-party claim against the employer-lessee, based on an indemnity clause of the lease which provided:

"Licensee [lessee] agrees to defend Licensor [lessor] and hold it harmless from any and all claims . . . arising from Licensee's operation of its business, including . . . any act or injury suffered by Licensee's employees . . . ." (738 S.W.2d at 599).

The Court held that

"The language of the indemnity agreement did not provide indemnity against the appellant lessor's own acts of negligence. We therefore conclude that there is no basis, given the provisions of Section 287.120.1, RSMo 1986, for finding an obligation on respondent's part to indemnify appellant. The third-party action was thus properly dismissed." (id. at 601).

As pointed out above, the indemnity clause of EFCO's Lease Agreement, like that in the Bonenberger case, says nothing about indemnifying against the negligence or fault of the lessor EFCO. EFCO could not have incurred any liability in the Stawizynski suit unless Stawizynski proved negligence or other fault of EFCO. As a matter of law, under the decisions cited, Section 287.120 bars EFCO from obtaining indemnity from Alberici against the claims in the Stawizynski suit because of the absence of any express, clear and unequivocal contractual undertaking by Alberici to indemnify EFCO from EFCO's own fault or negligence.

The Parks principle, applied in employer-employee situations, is similar in its effect to the "clear and unequivocal" rule applicable to indemnity contracts generally. In each case, broad contractual indemnity provisions are construed, as a matter of law, not to impose a duty to indemnify an indemnitee against the indemnitee's own negligence or wrongful conduct unless the contractual language says so explicitly.

But the reasons for imposing this explicit language requirement are different. In the general case, the clear and unequivocal rule requires explicit language in order to ensure that a party to an ordinary business transaction actually intended to assume the unusual position of a liability insuror. In the employment situation, the rule of Parks and

its progeny requires explicit language for the additional reason of ensuring that an employer actually intended to waive the statutory immunity granted to the employer by the Legislature in the Workers' Compensation Law.

IV.

The Trial Court erred in granting summary judgment to Plaintiff EFCO, because the Trial Court misapplied the law to the facts in construing Paragraph 14 of the Lease Agreement to require Alberici to indemnify EFCO against the Stawizynski suit, in that under Missouri law EFCO, as a manufacturer, had the duty to indemnify Alberici against products liability for EFCO's products; and the Lease Agreement was insufficient to overcome the obligation imposed on EFCO by law.

In product liability suits in Missouri, a party exposed to liability solely because of its status as a supplier of a product in the stream of commerce between the manufacturer and the ultimate user is entitled to indemnity from the manufacturer, including costs of defense (Palmer v. Hobart Corp. (Mo.App.E.D. 1993) 849 S.W.2d 135).

In the situation at hand, EFCO was the manufacturer of the concrete forms; Christopher Stawizynski was the ultimate user; and Alberici was, at most, a supplier in the stream of commerce. The allegations of the petition in the Stawizynski suit were directed solely at the conduct of EFCO as designer and manufacturer, and did not allege any wrongdoing by Alberici.

Therefore, the common law of Missouri would require EFCO to indemnify Alberici against Stawizynski's product liability claims. In the case at bar, EFCO seeks to use its Lease Agreement to reach the opposite result.

The Restatement, Second, Contracts, Section 195, Comment c, states that "in general, a term exempting the seller from [product] liability is unenforceable on grounds of public policy." If public policy prohibits a manufacturer from evading its product liability by release or disclaimer, it should logically also prohibit the manufacturer from evading its product liability by contractual indemnity.

At the least, the fact that Missouri law imposes the obligation on EFCO to indemnify Alberici in the first instance is yet another reason for requiring explicit contract language before turning the law on its head. The broad and general language of Paragraph 14 of EFCO's Lease Agreement should be construed in light of the policy expressed in the Palmer case. Since the law of Missouri would normally require EFCO to indemnify Alberici, a contract should not be construed to reach the opposite result unless the contract states explicitly, in so many words, that Alberici had agreed to indemnify EFCO against EFCO's product liability as a manufacturer. The Lease Agreement contains no such language.

V.

The Court should decline EFCO's invitation to change the law.

In tacit recognition that EFCO's claim cannot prevail under the existing law of Missouri, EFCO advanced the proposition before the Court of Appeals that when the

parties to a contract are "sophisticated commercial entities," explicit indemnity language should not be required and broad, sweeping language should be held sufficient to create a duty of one party to indemnify the other against the other's own fault or negligence. The Court should reject this proposition, which will sometimes be referred to for brevity hereinafter as EFCO's proposed change in the law.

An obvious reason to reject EFCO's proposed change in the law is that it would violate the policies underlying the doctrine of stare decisis. Far from merely engrafting a limited exception to existing law, EFCO's proposed change would require the Court to overrule its decisions in Missouri District Tel. Co., New York Cent. R. Co., Kansas City Power & Light, and Parks, and would overturn an entire body of well-developed Missouri law that lies squarely in the mainstream of American jurisprudence.

EFCO's proposed change would be particularly unjust in this case because the record shows that Alberici relied on the established principles of Missouri law when, through its insuror, Alberici rejected EFCO's demand to defend the Stawizynski suit. Alberici did so for the stated reason that EFCO's Lease Agreement "makes no mention" of indemnity "against EFCO's own fault or negligence" (LF v.1 pp.47-48), as would be required by existing law.

A. EFCO's proposed change in the law would be bad policy.

EFCO's proposed change in the law would be irrational and unjust because there is nothing inherent in a party's being either sophisticated or commercial that eliminates the reasons for the current rules of law.

This case illustrates the point. Assuming, arguendo, that Alberici can be described as a "sophisticated commercial entity," its dealings with EFCO were nevertheless carried out through one individual, Mr. Krispin, who was trained as an engineer, not a lawyer (LF v.1 p.22). The rental of EFCO's concrete forms was a small, routine matter in a large construction project. When presented with EFCO's printed rental form, Mr. Krispin justifiably thought he was signing a $3,300 rental contract, not issuing an insurance policy. Because EFCO's indemnity provisions were not conspicuous in its form contract, and were in fact buried in fine print on the back beneath a misleading heading, Mr. Krispin was not even aware that EFCO's rental form contained indemnity language (LF v.1 p.23). Even had he read the indemnity provisions, because they lacked explicit language Mr. Krispin likely would not have realized that they might be interpreted to require Alberici to waive its statutory right of immunity under the Workers' Compensation Law, or to become a liability insuror for EFCO's errors of design and manufacture. There was nothing about this small rental transaction to alert Mr. Krispin that EFCO's form contract might require review by legal experts. The ability of even sophisticated commercial entities to attend to the innumerable details of daily business would be severely hampered if it were otherwise.

EFCO's proposed change in the law would require a wholesale rejection of established principles. It is hard to find a reported indemnity case upholding either the clear and unequivocal requirement, or the conspicuousness requirement, or the requirement for explicit language for waiver of an employer's Workers' Compensation immunity, that does not involve a commercial entity of more or less sophistication.

These third-party indemnity issues typically do not arise in consumer transactions. EFCO's proposed change would therefore be an "exception" that obliterates the established rules in almost all cases.

EFCO's proposed change would also pose questions that have no rational answer. How much "sophistication" must a commercial entity have in order to lose the protection of the existing rules of law? In what areas of knowledge must the entity's "sophistication" be shown? A company like Alberici can be highly sophisticated in its own business of construction contracting, but know nothing about avoiding the risks of design and manufacturing errors in the production of concrete forms like EFCO's. The record here is bereft of any showing of such "sophistication" on the part of Alberici.

The fact is that the underlying reasons for applying the rules of existing law are as applicable, if not more so, to sophisticated commercial entities as to other parties.

As this Court observed in Alack, the fact that "our traditional notions of justice are . . . fault based" exerts a strong influence on contracting parties' understanding of their own contracts (923 S.W.2d at 337). As a result, a knowledgeable party in an ordinary business transaction expects to be responsible for his own fault or negligence, but does not expect to assume responsibility for the fault or negligence of another. A voluntary agreement to indemnify another against third-party liability for the other's own fault or negligence is an extremely unusual and hazardous undertaking, one that most individuals and business entities that are not insurance companies would neither willingly enter into, nor expect to result from ordinary commercial transactions. Therefore, before concluding that indemnity provisions in a contract impose such a harsh and unexpected

obligation, courts require a showing that there is "no doubt" that a reasonable person signing the contract would "actually understand" and assent to becoming the liability insuror for another (cf. Alack, 923 S.W.2d at 337-338). This has led the courts of Missouri and most states to impose special requirements when they are asked to find that a contract requires one party to indemnify the other against the other's own fault or negligence.

The requirement of conspicuousness helps to ensure that the indemnity provisions of the contract come to the actual attention of the putative indemnitor, rather than being buried in fine print boilerplate, as they were in EFCO's printed form. A party to a contract cannot "actually understand" that it is being asked to act as the liability insuror for another if it is not aware that such provisions are present in the contract. It is no answer to invoke the rubric that a signatory is bound to know the contents of what has been signed. The conspicuousness requirement is, by its nature, an exception to this general principle. Courts have required conspicuousness in addition to a signature, in order to increase the likelihood that a signatory is actually aware of the presence of particularly dangerous and unusual contract terms.

The clear and unequivocal requirement helps to ensure that if a party is aware of the presence of indemnity provisions, the party does not fall into the trap of assuming that broad, all-encompassing indemnity language would be interpreted in conformance with common-sense commercial expectations.

For example, suppose party "A" is asked to agree to indemnify party "B", in language similar to EFCO's Lease Agreement, against "any and all liability to third

persons, whether based on alleged negligence or otherwise." The thought process of party A might well be as follows: "'Any and all,' literally, would include every conceivable claim of a third person against B. But surely, 'any and all' is not intended to include some claims, such as claims for injury caused by B's intentional wrongdoing, or injury caused by negligence on the part of B. Since 'any and all' cannot mean literally every claim, it probably means what is usual and reasonable in business: I am to protect B against third-party liability resulting from my negligence or other wrongful acts, but not those of B."

The clear and unequivocal rule prevents party A from making the natural but dangerous assumptions set forth above. By requiring the indemnity language to also mention explicitly that it extends to B's own fault or negligence, the clear and unequivocal rule brings home to party A the actual understanding that party B is asking A to act as B's liability insuror, if that is B's intention.

The conspicuousness and clear and unequivocal requirements are by nature grounded in ordinary expectations of business and commerce. In fact, the more sophisticated a party is in business matters, the more the danger of being trapped unawares by broad, general indemnity language. A sophisticated business person would be more likely to know that indemnifying against another's fault or negligence is not usual in ordinary commercial transactions. A sophisticated business person would know that liability insurance depends on spreading and sharing large numbers of risks, and that insuring only one party's risk would be foolhardy. A sophisticated business person is therefore more likely to appreciate how unreasonable it would be to indemnify another

against the other's own fault or negligence, and is more likely, like "party A," to conclude that general language would not be construed to have such unreasonable effect. "When presented with a contract like this, even the most sophisticated of us are more properly counted among the hapless or unwary" (Alack, supra, 923 S.W.2d at 340 (Limbaugh, J., dissenting)).

It is no coincidence that the clear and unequivocal rule was adopted by this Court in cases that arose between sophisticated commercial parties. It would be anomalous and arbitrary for the Court to now reverse course as EFCO urges and abrogate, for sophisticated commercial parties, the clear and unequivocal rule, and the conspicuousness requirement, and the requirement for explicit language in Workers' Compensation situations. The Court should decline EFCO's invitation to change the law in this case because the change would be arbitrary, unjust and irrational.

B. EFCO's proposed change in the law

is unsupported by Missouri decisions.

No Missouri appellate court has adopted EFCO's proposed change in the law. To the contrary, the prior decisions of this Court that establish and apply the clear and unequivocal rule to indemnity contracts have all involved sophisticated commercial entities: A telephone company and a telegraph company in Missouri District Tel. Co.; two railroad companies in New York Cent. R. Co.; an electric utility and a large construction company in Kansas City Power & Light Co.; and a chemical manufacturer and a bulk chemical hauling company in Parks. All of these decisions are inconsistent with EFCO's proposed exception.

EFCO argued before the Court of Appeals that the decision of that Court in Monsanto Company v. Gould Electronics, Inc. (Mo.App.E.D. 1998) 965 S.W.2d 314 supported EFCO's proposed change. It may be sufficient to point out that the Court of Appeals itself disavowed EFCO's argument. In its opinion in this case, the Eastern District -- the same Court that decided Monsanto -- found Monsanto distinguishable from the instant case and held that" Monsanto is not contrary to the result reached here" (Slip Opn. p.6).

Furthermore, a closer look at the Monsanto decision shows that it was not grounded on the principle EFCO proposes. It goes without saying that the Eastern District could not have overruled the prior decisions of this Court, which had consistently applied the established rules of law to sophisticated commercial entities in indemnity cases, nor did it purport to do so. In fact, the Monsanto decision did not refer at all to any of the decisions of this Court or other Missouri appellate courts that uphold the established rules of law hereinabove set forth, signifying that the Monsanto Court believed it was dealing with a unique situation.

Monsanto dealt with a highly unusual set of factual circumstances that are unlikely to be repeated. A manufacturer of chemicals containing PCB's, and an experienced industrial user of such chemicals, entered into a special contract directed at a single subject -- the user's undertaking to indemnify the manufacturer against liability for environmental hazards associated with the PCB's. A copy of the contract was judicially noticed by the Eastern District in the instant case, and is included in the Appendix to this brief (pp. A3-A4). The Monsanto Court held that when both the manufacturer and the

user had been sued jointly for environmental damage caused by the PCB's, the manufacturer was entitled under the special contract to be indemnified by the user.

The Eastern District in Monsanto may well have concluded that in the unique circumstances of that case, it was unnecessary to discuss the conspicuousness requirement because it was impossible for the parties not to have been aware that their contract included an undertaking by the user to indemnify the manufacturer, that being the sole subject of their contract. The Court may likewise have concluded that it was unnecessary to discuss the cases upholding the clear and unequivocal requirement because the contract clearly identified the manufacturer's liability for environmental hazards of PCB's as the risk being assumed by the user through indemnity, a risk that necessarily included possible fault or negligence of the manufacturer.

The unusual, single-purpose contract (App. pp. A3-A4) is the distinctive feature of Monsanto. The fact that both parties were large commercial entities is beside the point, except to show that the user was experienced and familiar with the particular risks identified in the contract as the subject of the indemnity. The critical fact is that it was impossible for the parties not to have been aware of the significance of the indemnity provisions of their contract since indemnity against environmental liability was the sole subject of the contract.

The facts are completely different here. The ostensible subject of EFCO's Lease Agreement was the rental of concrete forms, not indemnity. The indemnity language was buried in printed boiler plate, which Alberici's Project Manager did not even think it necessary to read because of its misleading heading (LF v.1 p.23). Unlike

the contract in Monsanto, the Lease Agreement did not identify EFCO's liability for design defects, manufacturing defects, fall hazards, or any other particular risk being allocated through indemnity. In addition, the status of Mr. Stawizynski as an employee of Alberici invokes the rule of Parks v. Union Carbide and its progeny in this case, whereas employer immunity under the Workers' Compensation Law was not an issue in Monsanto.

The EFCO Lease Agreement is exactly the type of contract for which the clear and unequivocal requirement and the conspicuousness requirement exist, to prevent a party in ordinary commercial dealings from inadvertently becoming a liability insuror of the other party's negligence. The Monsanto decision could not be reconciled with controlling decisions of this Court such as Missouri District Tel. Co., Kansas City Power & Light Co. and Parks v. Union Carbide if it stood for EFCO's proposed change in the law. As the Eastern District recognized, Monsanto should be confined to its facts, and has no application here.

EFCO also sought support for its proposed change in the law in a footnote appearing in this Court's decision in Alack v. Vic Tanny International of Mo., Inc., supra. However, the Alack decision did not change the law, and the Court's footnoted comment in that case does not support EFCO's proposed change.

Alack involved a contract for a health club membership between the club and an individual consumer, containing a general exculpatory clause by which the individual released the club from "any and all claims" for injuries sustained while using the club facilities. The Court held that the contract was not sufficient to release the club from

liability for the club's own future negligence, because "clear and explicit language in the contract is required to absolve a person from such liability" (923 S.W.2d at 334). This holding is obviously similar to (but not identical with) the clear and unequivocal requirement for contracts to indemnify another against the other's fault or negligence.

The Court's opinion stated that "There must be no doubt that a reasonable person agreeing to such an exculpatory clause actually understands what future claims he or she is waiving" (923 S.W.2d at 337-338). In a footnote to this statement, the Court observed that "this case does not involve an agreement negotiated at arms length between equally sophisticated commercial entities. Less precise language may be effective in such situations, and we reserve any such issues" (923 S.W.2d at 338, n.4).

Alack involved a release in a consumer sales contract, an arrangement accorded special treatment under the law (see, e.g., Section 407.330 RSMo). The footnote signaled that the Court was reserving judgment whether the same analysis would be applied to a release in a commercial contract. The footnote was dictum in the opinion, and did not of itself establish any exception to the requirement for "clear and explicit language" to release a party from its own future negligence.

More importantly, Alack involved a release, not an indemnity provision as in this case. The difference is fundamental. A party who releases another from liability for future negligence releases only his own potential claims against the other. The most the releasing party has at stake is the value of his own future claims. However, a party who agrees to indemnify another against the other's negligence and fault assumes the liability of the other to the entire world. The exposure of the indemnitor to loss is without limit.

Although both actions involve a transfer of risk, the potential magnitude of the risk in the indemnity case is far greater than in the release. There is correspondingly more reason to require explicit language in an indemnity agreement (the clear and unequivocal rule) than in a release.

Furthermore, EFCO ignores the fact that the footnote in Alack does not refer merely to "sophisticated commercial entities," but to agreements "negotiated at arms length" between such entities. The theme of the statement to which the footnote is appended is that there be "no doubt" that a party "actually understands what future claims he or she is waiving" (923 S.W.2d at 337-338). To demonstrate actual understanding, a showing of actual, arm's length negotiation is far more relevant than the parties' status as sophisticated commercial entities.

Even ignoring the difference between a release and indemnity, the Alack footnote would have no application to the instant case. EFCO has admitted in the record that there was no negotiation between Alberici and EFCO over Paragraph 14 of EFCO's printed form contract (LF v.1 p.23). Mr. Krispin did not read Paragraph 14, and thus could not have had any "actual understanding" of the indemnity provisions therein (id.).

Neither Monsanto nor Alack involved employer immunity under the Workers' Compensation Law. Since the requirement for explicit indemnity language was laid down in Parks v. Union Carbide, supra, no Missouri case has even hinted that broad, general indemnity language would be sufficient to waive an employer's statutory immunity merely because the employer is a "sophisticated commercial entity."

C. EFCO's proposed change in the law is unsupported by decisions of other states.

Not only does EFCO's proposed change in the law derive no support from Missouri law, it is not supported by the law of other states.

The clear and unequivocal rule, holding that contractual indemnity against an indemnitee's own fault or negligence requires words explicitly stating that intent and will not be found from broad, all-encompassing indemnity language, is the general rule of American law (15 Williston, Contracts (3d Ed.) Section 1750A, p.141). Appellant's research discloses that the clear and unequivocal rule or its equivalent has been upheld in judicial decisions in at least 34 states, without any exception for sophisticated or commercial parties:

Industrial Tile, Inc. v. Steward (Ala. 1980) 388 So.2d 171; Washington Elem. Sch. Dist. v. Baglino Corp. (Ariz. 1991) 817 P.2d 3; Paul Hardeman, Inc. v. J.I. Hass Co. (Ark. 1969) 439 S.W.2d 281; Goldman v. Ecco-Phoenix Elec. Co. (Cal.banc 1964) 396 P.2d 377; State v. Interstate Amiesite Corp. (Del. 1972) 297 A.2d 41; Cox Cable Corp. v. Gulf Power Co. (Fla. 1992) 591 So.2d 627; Batson-Cook Co. v. Georgia Marble Setting Co. (Ga.App. 1965) 144 S.E.2d 547; Keawe v. Hawaiian Elec. Co. (Hawaii 1982) 649 P.2d 1149; McNiff v. Millard Maint. Serv. Co. (Ill.App. 1999) 715 N.E.2d 247; Indiana State Hwy. Comm. v. Thomas (Ind.App. 1976) 346 N.E.2d 252; Martin & Pitz v. Hudson Const. Serv., Inc. (Iowa 1999) 602 N.W.2d 805; Butters v. Consolidated Transfer & Warehouse Co. (Kansas 1973) 510 P.2d 1269; Dartez v. Atlas Assur. Co. (La.App. 1999) 746 So.2d 777; Emery Waterhouse Co. v. Lea (Me. 1983) 467 A.2d 986; Crockett v.

Crothers (Md.App. 1972) 285 A.2d 612; Meadows v. Depco Eqpt. Co. (Mich.App. 1966) 144 N.W.2d 844; National Hydro Systems v. M.A. Mortenson Co. (Minn. 1995) 529 N.W.2d 690; Blain v. Sam Finley, Inc. (Miss. 1969) 226 So.2d 742; Slater v. Central Plumbing & Heating Co. (Mont. 1996) 912 P.2d 780; Oddo v. Speedway Scaffold Co. (Neb. 1989) 443 N.W.2d 596; Calloway v. City of Reno (Nev. 1997) 939 P.2d 1020; Leitao v.Damon G. Douglas Co. (N.J.App. 1997) 693 A.2d 1209; Hoisington v. ZT-Winston-Salem Assoc. (N.C.App. 1999) 516 S.E.2d 176; Fretwell v. Protection Alarm Co. (Ok. 1988) 764 P.2d 149; Ruzzi v. Butler Petroleum Co. (Pa. 1991) 588 A.2d 1; Rhode Island Hosp. Trust Nat. Bank v. Dudley Service Corp. (R.I. 1992) 605 A.2d 1325; Federal Pacific Elec. v. Carolina Prod. Enterprises (S.C.App. 1989) 378 S.E.2d 56; Summers Hardware & Supp. Co. v. Steele (Tenn.App.1990) 794 S.W.2d 358; Dresser Industries, Inc. v. Page Petroleum, Inc. (Tex. 1993) 853 S.W.2d 505; Union Pacific R. Co. v. El Paso Nat. Gas Co. (Utah 1965) 408 P.2d 910; Dirk v. Amerco Marketing Co. (Wash. 1977) 565 P.2d 90; Sellers v. Owens-Illinois Glass Co. (W.Va. 1972) 191 S.E.2d 166; Spivey v. Great Atl. & Pac. Tea Co. (Wis. 1977) 255 N.W.2d 469; Wyoming Johnson, Inc. v. Stag Industries, Inc. (Wyo. 1983) 662 P.2d 96.

Appellant's research has disclosed no case in another jurisdiction which held, as EFCO proposes, that either the clear and unequivocal rule, or the conspicuousness requirement, should be disregarded merely because the parties to contractual indemnity are "sophisticated commercial entities."

A similarity of language suggests that the use of this phrase in the Alack footnote may have been prompted by a comment of the New York Court of Appeals in

Gross v. Sweet (N.Y. 1979) 400 N.E.2d 306, a case cited in Alack. The Gross opinion (400 N.E.2d at 310) noted that in New York, the explicit language requirement has been "somewhat liberalized" as applied to indemnification clauses "'negotiated at arms length between . . . sophisticated business entities,'" [citing Hogeland v. Sibley, Lindsay & Surr Co. (N.Y. 1977) 366 N.E.2d 263] "though even then it must evince the 'unmistakable intent of the parties.'"

Hogeland involved a department store lease in a shopping center. The lease required the tenant to indemnify the landlord against liability for third-party injuries, and required the tenant to maintain liability insurance naming the landlord as an insured. The court emphasized the fact that the lease was "negotiated at arm's length between the representatives of two sophisticated business entities" and was "not dominated by either party" (366 N.E.2d at 266). The court held that a contract "entered into under such circumstances is no longer to be construed" strictly by the clear and unequivocal rule; "instead we now look to the 'unmistakable intent of the parties'" (id.). The court concluded that in the case before it, the "the parties are allocating the risk of liability to third parties between themselves, essentially through the employment of insurance" (366 N.E.2d at 267).

Clearly, the relaxation of the clear and unequivocal rule in New York under the Hogeland decision does not support the simplistic exception for "sophisticated commercial entities" urged by EFCO. The most important fact in Hogeland was not that the parties were commercial or sophisticated, but that their indemnity agreement was negotiated at arm's length, and the court was satisfied by this, and other circumstances

including their agreed insurance requirements, of their "unmistakable intent" to include negligence of the indemnitee in the indemnity undertaking. The parties' status as sophisticated commercial entities merely meant that each could hold its own in the actual negotiations that took place. In the case at bar, by contrast, the indemnification provisions were buried in EFCO's printed rental form, there was no negotiation of these provisions, and there was no agreement by Alberici to furnish a policy of liability insurance for EFCO.

Furthermore, other states have moved in the opposite direction to New York. In Ethyl Corporation v. Daniel Construction Co. (Tex. 1987) 725 S.W.2d 705,707, the Texas Supreme Court noted that its trend has been "toward more strict construction of indemnity contracts" when an indemnitee claims indemnity against its own fault or negligence. In Ethyl (725 S.W.2d at 707-708), the Court adopted a rule of construction even more rigorous that the clear and unequivocal standard, as an antidote to the efforts of "scriveners of indemnity agreements" to attempt to "indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that intent from the indemnitor" -- a fair description of Paragraph 14 of EFCO's rental form.

By their nature, cases involving Workers' Compensation immunity almost always involve employers that are commercial entities, not consumers. Appellant has found no authority in any state suggesting that the explicit language requirement might be relaxed for "sophisticated commercial entities" in cases involving Workers' Compensation immunity. Indeed, deference to legislative policy has led some courts to refuse to give effect to any contractual waiver of the employer's statutory immunity, no matter how

explicit (e.g., Paul Krebs & Assoc. v. Matthews & Fritts Construction Co., Inc. (Ala. 1978) 356 So.2d 638; Gulf Oil Corp. v. Rota-Cone Field Operating Co. (N.M. 1972) 505 P.2d 78).

CONCLUSION

For all of the reasons set forth above, Appellant Alberici respectfully submits that this Court should determine that EFCO's Lease Agreement was insufficient, as a matter of law, to impose on Alberici a duty to indemnify EFCO against the allegations in Stawizynski's petition, and therefore did not require Alberici to defend EFCO in the Stawizynski suit. In its Judgment and Order, the Trial Court cited no authority for its contrary construction of Paragraph 14 of the Lease Agreement, and offered no explanation for its failure to follow the decisions of this Court and the other Missouri appellate cases cited herein. This Court should reverse the judgment of the Trial Court, and direct that Alberici's Motion for Summary Judgment be granted and that judgment be entered in favor of Alberici in this action.

David G. Millar #19456
Gregory F. Hoffmann #22101
MILLAR, SCHAEFER, HOFFMANN
& ROBERTSON

230 S. Bemiston Ave., Suite 1110
St. Louis, Missouri 63105
(314) 862-0983 (Tel)
(314) 862-3490 (Fax)

Attorneys for Appellant,
J.S. Alberici Construction Co., Inc.